BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KENNETH E. HALFORD, DECEASED	)	
Claimant	)	
	)	
VS.	)	
	)	
NOWAK CONSTRUCTION CO., INC.	)	
Respondent	)	Docket No. 1,015,558
	)	
AND	)	
	)	
ST. PAUL FIRE & MARINE	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the October 30, 2006 Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on January 24, 2007.

APPEARANCES

R. Todd King, of Wichita, Kansas, appeared for the claimant. Vincent A. Burnett, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ concluded that at the time of claimant's accident on November 13, 2003, claimant was on his way to assume the duties of his employment and his claim, as well as those of his sole dependent, are barred by the going and coming rule of K.S.A. 44-508(f). And that while the modifications to the vehicle the claimant was driving increased his chances of rolling over while operating the vehicle, the evidence failed to establish that the

altered propensity to rollover caused or contributed to claimant's accident and his fatal injuries.

The claimant requests review of whether his accident arose out of and in the course of his employment and whether the ALJ erred by failing to award death benefits in this matter. Claimant first contends that travel was an inherent and integral part of the job and that the respondent benefitted from the claimant driving directly to the work site without having to first drive to the employer's business to pick up the company vehicle. Claimant also contends that the modifications made to the company truck contributed to the accident and constituted a special risk or hazard, thereby giving rise to liability under the Kansas Workers Compensation Act.

Respondent contends that the claimant was on his way to assume the duties of his employment at the time of his accident. Thus, the ALJ properly concluded that the claimant's claim is precluded by virtue of the "going and coming" rule codified at K.S.A. 44-508(f). Respondent also argues that claimant has failed to establish with the requisite sufficiency that the modifications to the claimant's work vehicle contributed to his accident and thus, created any special risk or hazard.[1]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the majority concludes that travel was an inherent part of claimant's job with respondent and as such, he was within the course and scope of his employment at the time of his fatal accident. Accordingly, the ALJ's Award should be reversed and death benefits are awarded to claimant's sole surviving child, Dyllan Halford.[2]

The ALJ accurately set forth the facts and circumstances surrounding the claimant's fatal automobile accident which occurred on November 13, 2003. The Board adopts that detailed recitation of facts as its own, to the extent that it is consistent with the majority's opinions and conclusions found herein. Only those facts relevant to the Board's findings will be restated.

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of

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[1] At oral argument, respondent's counsel abandoned any argument relating to an intoxication defense under K.S.A. 44-501(d)(2).

[2] Because Dyllan remains a minor as of the time of this Order, he is unable to directly receive the proceeds of this Order. K.S.A. 44-513a. Accordingly, a conservatorship must be established for his benefit before any monies can be paid. See K.S.A. 59-3059 et seq.

compensation and to prove the various conditions on which his or her right depends.[3] A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."[4] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[5]

K.S.A. 2002 Supp. 44-508(f) provides in pertinent part:

> The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

K.S.A. 2002 Supp. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[6] In *Thompson*, the Court, while analyzing what risks were causally related to a worker's employment, wrote:

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.[7]

But K.S.A. 2002 Supp. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's

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[3] K.S.A. 44-501(a) (Furse 2000); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[4] K.S.A. 44-501(a).

[5] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

[6] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

[7] *Thompson* v. *Law Office of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

premises.[8] Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.[9]

The Kansas Appellate Courts have also provided exceptions to the "going and coming" rule, for example, a worker's injuries are compensable when the worker is injured while operating a motor vehicle on a public roadway and the operation of the vehicle is an integral part or is necessary to the employment.[10] It is this exception that is at the heart of this claim.

In *Messenger*, the claimant was killed in a truck accident "on the way home from a distant drill site" and the court was asked to decide whether claimant's claim was compensable or barred by the going and coming rule. The *Messenger* Court noted that it was customary in the oilfield industry for the employer to pay the driller to drive and to transport his crew.[11] The employer also provided the employee with a company vehicle which he was allowed to take home and drive to the work site each day, thus furthering the employer's interests.[12] It was also important that the employee had no fixed work site.[13]

Two other cases that discuss this travel exception are *Kindel*[14] and *Foos.*[15] In *Kindel*, the claimant was "expected to live out of town during the work weeks, and transportation to and from the remote site was in a company vehicle driven by a supervisor."[16] But on the day in question, the claimant and his supervisor were on their way home when they stopped at a local club where they became inebriated. After leaving the club, the two were involved in an automobile accident. The *Kindel* Court was asked whether an employee's personal or non-business-related activity would be considered a

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[8] Id. at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area, controlled by the employer.

[9] *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, 907 P.2d 828 (1995).

[10] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556 *rev. denied* 235 Kan. 1042 (1984).

[11] *Id.* at 440.

[12] *Id.* at 439.

[13] *Id.*

[14] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[15] *Foos v. Terminix*, 277 Kan. 687, 89 P.3d 546 (2004).

[16] *Kindel*, 258 Kan. at 277.

deviation from the employer's work. Absent the deviation to the club, the claimant's trip home with his supervisor was considered compensable under the travel exception.

Similarly, in *Foos*, the claimant was hired as a pest control technician and was provided a vehicle to use on his route. His job required him to regularly drive from his home to each of his accounts along his route and back again. On the day of his accident, claimant was on his way home to Solomon, Kansas after taking a deviation from his normal route to participate in a golfing contest. The Kansas Supreme Court concluded that claimant had returned to his employment and was engaged in traveling on a public highway, an activity contemplated by his employer, and thus, his accidental injury arose out of and in the course of his employment.[17]

Taken together, these cases illustrate the principle advanced by the claimant. Travel is inherent in claimant's job as a supervisor for respondent. And he was on his way to work on the day of his accident in a truck provided by respondent and because he was performing a task contemplated by respondent, his death is, according to claimant, compensable.

The ALJ concluded that "at the time of the accident on November 13, 2003, [c]laimant was on his way to assume the duties of his employment, and his claims are barred by the "going and coming rule" of **K.S.A. 44-508(f)**."[18] The ALJ noted that "there is no evidence as to a custom within the road building industry that foremen be paid for their travel. There was similarly no evidence that *[c]laimant* was paid to drive, and no evidence whatsoever that he was paid to transport employees such as Mr. Benson [one of claimant's co-workers and the individual who regularly commuted with claimant to and from the job sites]. Indeed, Benson acknowledged that if the route to the job site would have required [c]laimant to travel out of his way to pick Benson up, he would not have ridden with [c]laimant."[19] He went on to note that there was no evidence as to whether claimant was paid only after he arrived at the shop or job site and began performing his functions as foreman.[20] Finally, he concluded:

> While the nature of [r]espondent's business contemplated different job sites over time, there is no evidence in the record as to how long [c]laimant had been, or was to be, assigned to the job site in Goddard, Kansas. If [c]laimant had numerous job sites to which he had to travel over the course of his work day, his argument that travel was integral to his employment would be stronger. The current state of the

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[17] *Foos*, 277 Kan at 692.

[18] ALJ Award (Oct. 30, 2006) at 3. (emphasis supplied)

[19] *Id.*

[20] *Id.*

> record establishes that [c]laimant had a specific, identifiable job site to which he was expected to report, and that he was commuting to either that job site or the company shop at the time of his accident.[21]

The majority of the Board has considered the record as a whole and concludes that travel was, indeed, an inherent part of claimant's job as a foreman for respondent's construction business. Respondent provided claimant with a vehicle that not only transported himself to and from the job site and the company shop, but also tools and fuel for equipment, all used on the construction site(s). Although the ALJ believed there was no "evidence that the vehicle was provided to [c]laimant for that purpose", the majority finds that the law does not require an admission or express declaration of the vehicle's purpose in order for the inherent travel exception to apply.

The majority makes this finding not based solely upon the provision of a vehicle, which was used to transport claimant and, at times, a co-worker to the job sites, but that the truck also was equipped with other items that were used in furtherance of respondent's construction business. And the greater weight of the evidence indicates that claimant proceeded directly to the construction site each day and did not, routinely, report to the company shop each day before reporting to the construction site. Based on these facts, the majority finds that travel was part and parcel of claimant's job as a construction foreman. Accordingly, the ALJ's Award is reversed and claimant is found to have been in the course and scope of his employment at the time of his accident on November 13, 2003.

The balance of claimant's arguments are moot.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated October 30, 2006, is reversed and Dyllan Halford, as the sole surviving minor child of Kenneth Halford is entitled to an Award against respondent and its carrier as follows:

AN AWARD OF COMPENSATION IS HEREBY ENTERED IN FAVOR OF Dyllan Halford, claimant's sole surviving minor child, against the respondent, Nowak Construction Co., Inc., and its insurance carrier, St. Paul Fire and Marine, for an accidental injury which occurred on November 13, 2003, and based on an average weekly wage of $779.05, for compensation at the rate of $440.00 per week from November 13, 2003.

Subject to the provisions below and K.S.A. 44-510b, payment shall be paid to Dyllan Halford, the claimant's sole surviving minor child, through a court-appointed conservator,

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[21] *Id.* at 8-9.

until such time as he reaches the age of 18, then all further payments are to be made directly to Dyllan Halford.

The claimant's sole surviving minor child is entitled to a $40,000 lump sum amount again made payable to the court-appointed conservator

For the period from November 13, 2003 to February 8, 2007, Dyllan Halford is entitled to $440.00 per week for 169.14 weeks, or $74,421.60, plus a lump sum of $40,000, all of which is currently due and owing, less amounts previously paid. Thereafter, payment is to be provided at $440.00 per week until Dyllan reaches the age of majority, or if he continues in school as contemplated by K.S.A. 44-510b(a)(3)(B). Notwithstanding language to the contrary, the maximum amount of compensation payable to Dyllan shall not exceed $250,000.

The respondent and insurance carrier are also ordered to provide reimbursement of claimant's funeral expenses incurred not to exceed to statutory maximum of $5,000, and ordered to pay medical expenses incurred, less amounts previously paid under this claim for workers compensation benefits or amounts subject to credit pursuant to K.S.A. 44-504(b).

The record does not contain a filed fee agreement between claimant and his/her attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he/she must file and submit his/her written contract with claimant to the ALJ for approval.

To the extent not otherwise modified herein, the Orders contained within the ALJ's Award are hereby adopted and affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

The undersigned Board Members respectfully dissent from the majority's holding and would affirm the ALJ's Award, affirming the factual and legal conclusions contained therein. These members would find that while claimant may have been provided a vehicle to travel to remote job sites and to carry tools and fuel, on the morning of his accident, claimant was exposed to no further risk than any other employee as they traveled to work at their normal work site. Claimant was driving to the company shop and intended to pick up his co-worker Mr. Benson along the way. He needed to retrieve some materials from the shop and then intended to proceed to the job site. Thus, like those employees who routinely report to the brick-and-mortar building each day, he was driving to the shop. While it is extremely unfortunate that he suffered a fatal accident, these members see no distinction between this scenario and the penumbra of risks to which every other employee might be exposed on their daily commute. Had claimant been on his way to the job site, then these members would, like the majority, find that claimant was injured in an accident that was not excluded by the going and coming rule, as travel was inherent in his job as a supervisor.

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BOARD MEMBER

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BOARD MEMBER

c: R. Todd King, Attorney for Claimant
Vincent Burnett, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge